Supreme Court, U.S.
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No. 99-1680

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE WRIT 1

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THE U.S. SUPREME COURT IN *FW/PBS* 1

II. THE COURT OF APPEALS APPLIED THE APPROPRIATE BURDEN OF PROOF IN ANALYZING THE LICENSING SCHEME 1

III. IN ACCORD WITH U.S. SUPREME COURT DECISIONS, THE LICENSING SCHEME PROVIDES OBJECTIVE STANDARDS OF RENEWAL TO GUIDE THE DECISION-MAKER 7

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLES OF *FW/PBS* IN DETERMINING THAT WAUKESHA'S LICENSING SCHEME CONTAINS THE APPROPRIATE PROCEDURAL SAFEGUARDS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bamon Corp. v. City of Dayton, 923 F.2d 470 (6th Cir. 1991) 5

Berg v. Health & Hospital Corp., 865 F.2d 797 (7th Cir. 1989) 5

Brandmiller v. Arreola, 199 Wis.2d 528, 544 N.W.2d 894 (1996) 6

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 7, 8

City News and Novelty, Inc. v. City of Waukesha, 170 Wis.2d 14, 487 N.W.2d 316 (Wis. App. 1992) 6, 8

Complaint Against Grady, 118 Wis.2d 762, 348 N.W.2d 559 (1984) 9

Doe v. City of Minneapolis, 899 F.2d 612 (8th Cir. 1990) 5

East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995) 4, 5

Freedman v. Maryland, 380 U.S. 51 (1965) 2, 3, 4, 5

FW/PBS v. Dallas, 493 U.S. 215 (1990) ..... *passim*

Graff v. Chicago, 9 F.3d 1309 (7th Cir. 1993) 4, 5, 9

Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth., 984 F.2d 1319 (1st Cir. 1993) 9

Kenosha County v. C & S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999) 6

Lounge Management, Ltd. v. Town of Trenton, 219 Wis.2d 13, 580 N.W.2d 156 (1999) 6

TABLE OF AUTHORITIES – Continued

Page

Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994) 10

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 2, 3

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 2, 3

State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989) 6

State v. Ruesch, 214 Wis.2d 548, 571 N.W.2d 898 (Ct.App. 1997) 6

Suburban Video, Inc. v. City of Delafield, 694 F. Supp. 585 (E.D. Wis. 1986) 5

TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994) 9

United States v. Salerno, 481 U.S. 739 (1987) 9

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 8

Young v. American Mini Theatres, 427 U.S. 50 (1976) 2, 3

WISCONSIN STATUTES

68.12(1) 10

944.21 6

OTHER AUTHORITIES

Waukesha Municipal Code § 8.195 8

REASONS FOR DENYING THE WRIT

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE COURT OF APPEALS APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THE U.S. SUPREME COURT IN *FW/PBS*

The only Supreme Court jurisdictional rule applicable to this petition is Rule 10(c). Petitioner contends that a state court has decided "an important federal question in a way that conflicts with relevant decisions of this Court." This is not the case because the Wisconsin Court of Appeals analyzed the City of Waukesha's licensing scheme under the guidance of the United States Supreme Court's decision in *FW/PBS v. Dallas*, 493 U.S. 215 (1990). The law is clear in this area and the Court of Appeals has correctly applied the law to the particular facts of this case. The Court of Appeals unequivocally indicated that it applied the constitutional framework in *FW/PBS* to its examination of the City's licensing scheme. (A. 9 to A. 12). Therefore, the criteria for review under Rule 10(c) has not been met and the writ should not be granted.

II. THE COURT OF APPEALS APPLIED THE APPROPRIATE BURDEN OF PROOF IN ANALYZING THE LICENSING SCHEME

The petitioner argues that the Wisconsin Court of Appeals erred by not placing upon the City the burden of proof to establish the constitutionality of the ordinance. As such, petitioner argues that this analysis by the Court of Appeals conflicts with controlling opinions of the U.S.

Supreme Court and other appellate court decisions. (Petition pp. 5-10). The petitioner's argument is a clear misstatement of the law.

The petitioner cites numerous decisions of this Court as holding that any government licensing scheme must be interpreted as a prior restraint, and therefore must be presumed unconstitutional. (Petition p. 5). However, petitioner's argument fails because the City of Waukesha's licensing scheme does not regulate the content of protected speech. It is a content-neutral time, place and manner restriction that has neither the purpose nor effect of imposing any limitation or restriction on the content of any communicative materials sold by the petitioner. The ordinance, unlike the statute at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965) does not create a censor. Therefore, *FW/PBS* correctly distinguished the ordinance at issue there from *Freedman*.

Prior to *FW/PBS*, courts did not apply prior restraint analysis to content-neutral licensing schemes. Instead, courts limited their review to whether the regulations in question were content-neutral time, place, and manner regulations designed to serve a substantial government interest, and did not unreasonably limit alternative avenues of communication. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976). These cases post-date *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), which petitioner cites in support of its argument that the City's ordinance improperly places uncontrolled discretion in the hands of its officials. (Petition p. 11). The Wisconsin Court of Appeals correctly rejected this argument (A. 14) because the ordinance at issue here is entirely different. *Shuttlesworth*

involved an ordinance in which the issuance of parade permits were used as a means of regulating the content of expressive activity. *Renton* and *Young* dealt with exactly the type of content-neutral ordinance that is at issue here. Petitioner fails to make that distinction in its analysis of *Shuttlesworth* and *FW/PBS*.

FW/PBS v. Dallas was the first case that held that content-neutral licensing ordinances required any sort of prior restraint analysis. In a plurality decision, the court concluded that two prior restraint safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), apply to content-neutral licensing schemes. The court also concluded that the third prong of the prior restraint protections – that the governmental authority bore the burden of proving its constitutionality beyond a reasonable doubt – did not apply. 493 U.S. at 228, 246. Justice O'Connor stated that,

> The licensing scheme we examined today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman* the censor engaged in direct censorship of a particular expressive material. Under First Amendment jurisprudence, such regulation of speech is presumptively invalid and therefore the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court . . . . *We conclude the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court.*

FW/PBS, 493 U.S. at 229-230 (emphasis added).

Following this decision, courts analyzing similar licensing schemes relied upon it to conclude that content-

neutral licensing schemes must meet the first two *Freedman* procedural safeguards that (1) the status quo must be maintained prior to judicial review; and (2) expeditious judicial review must be available. But the third *Freedman* requirement, that the government bore the burden of proving its constitutionality, has not been held applicable. Most notably, the Seventh Circuit so concluded in *Graff v. Chicago*, 9 F.3d 1309 (7th Cir. 1993):

> In *FW/PBS* the Court held that the city of Dallas need not bear the burden of going to court nor the burden of proof once in court for two reasons: The ordinance was not presumptively invalid because the decision maker did not pass "judgment on the content of any protected speech." Also, "[b]ecause the license [or in this case, a permit] is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through the court." 493 U.S. at 229-30.

Graff, 9 F.3d at 1324 n.11. *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) ("Although the court's opinion was fragmented, six justices agreed that at least the first two requirements in *Freedman* were applicable"). *Id.* at 224 n.4.

Petitioner's assertion (Petition p. 9) that the narrowest reading of *FW/PBS* would entail applying a full prior restraint analysis to all content-neutral licensing schemes is not supported by the law. The narrowest reading of *FW/PBS*, as correctly applied by the Wisconsin Court of Appeals, would extend the least amount of prior restraint analysis to content-neutral licensing schemes and therefore incorporate only the first two prior

restraint safeguards. Thus, consistent with *FW/PBS*, later decisions such as *Graff* and *East Brooks Books* applied the first two prongs of prior restraint analysis but refused to apply the third and allocate the burden to the City to prove the regulations' constitutionality.

The City of Waukesha's adult establishment licensing scheme by its own terms has neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials. The petitioner simply ignores the content-neutral character of the ordinance. The licensing and regulation of adult-oriented establishments as set forth in the Waukesha Code is for the purpose of combating and curbing secondary effects of such establishments. (A. 95 to A. 97). The Waukesha ordinance is in accord with many other ordinances that have been upheld across the nation that advance a substantial governmental interest of combating the secondary effects associated with sexually oriented businesses. *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990); *Berg v. Health & Hospital Corp.*, 865 F.2d 797 (7th Cir. 1989). Ordinances such as Waukesha's have been justified as being narrowly tailored to serve a significant governmental interest. *Id.* Also, *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991). The Court of Appeals further recognized that an identical licensing scheme in relevant part was upheld as being narrowly tailored and furthering a substantial governmental purpose. *Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585 (E.D. Wis. 1986). Therefore, the City of Waukesha's adult establishment licensing scheme is content-neutral and not subject to the third *Freedman* procedural safeguard.

Petitioner also ignores the difference between a content-neutral ordinance and a content-based regulatory scheme. In contrast, Wisconsin's courts have clearly shown that they understand the difference between a content-neutral licensing scheme and ordinances which prohibit protected expression. The ordinance in question in *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis.2d 13, 580 N.W.2d 156 (1998) prohibited all public nudity. *Kenosha County v. C & S Management*, 223 Wis.2d 373, 588 N.W.2d 236 (1999), involved an application of § 944.21, Wis. Stats., which prohibits the sale of obscene material. These laws encompassed expressive activities, but had no connection with their secondary effects such as prostitution, sexual assault, and other criminal activities.

Unlike the ordinance in *Lounge Management*, there are no allegations, nor has there been any evidence shown that the Waukesha ordinance is content based or encompasses "expressive activities that do not implicate the secondary effects that the town may legitimately seek to regulate." *Lounge Management*, 580 N.W.2d at 161. The Court of Appeals recognized this fact itself in an earlier challenge to this ordinance by this plaintiff. *City News and Novelty, Inc. v. City of Waukesha*, 170 Wis.2d 14, 25-6, 487 N.W.2d 316 (Wis. App. 1992).

Although content-based regulations restricting First Amendment protected speech certainly are presumed unconstitutional, Wisconsin courts recognize that is not the case when content-neutral restrictions are at issue. *See, Brandmiller v. Arreola*, 199 Wis.2d 528, 544 N.W.2d 894 (1996); *State v. Ruesch*, 214 Wis.2d 548, 571 N.W.2d 898 (Ct.App. 1997) (citing *State v. McManus*, 152 Wis.2d 113, 447 N.W.2d 654 (1989)) in support of its holding that the

party challenging a content-neutral statute must prove beyond a reasonable doubt that there are no possible interpretations of the statute which would be constitutional.

The Petitioner's argument that the City needed to prove that its ordinance is constitutional beyond a reasonable doubt is in direct conflict with *FW/PBS v. Dallas* and its progeny. It does not satisfy the requirement set forth in Rule 10(c) for review by this Court.

III. IN ACCORD WITH U.S. SUPREME COURT DECISIONS, THE LICENSING SCHEME PROVIDES OBJECTIVE STANDARDS OF RENEWAL TO GUIDE THE DECISIONMAKER

The petitioner argues that the licensing ordinance does not contain sufficiently objective standards governing renewal decisions to prevent the exercise of unlawful discretion. It cites *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), in support of this contention. (Petition pp. 11-13).

The fundamental principles enumerated in *City of Lakewood* require a permit or licensing scheme to establish clear guidelines limiting the discretion of the official designated to issue the permit or license to ensure that protected speech is not suppressed. The Wisconsin Court of Appeals applied this well-settled principle of constitutional law in holding that the same pitfalls present in the *Lakewood* case were not present in Waukesha's licensing scheme. (A. 15.) This is only logical, since by the time the government is deciding sanctions, it has already made its determination whether to deny (or in this case not renew)

a license, and has therefore followed clear and discernible standards prescribed by the ordinance as required by *Lakewood* and its progeny.

Arguing that the City does not have discernable standards to guide the decisionmaker, the petitioner claims that the ordinance should have had a range of provisions for the City to choose between mild and severe punishments. (Petition pp. 12-13). This apparently is an attempt to convince the Court to apply the "least restrictive alternative" test. However, that test is not applicable to content-neutral regulations that promote a substantial governmental interest.

> Restrictions on the time, place and manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech . . . less any confusion on this point remain, we reaffirm today that a regulation of time, place and manner of protected speech need not be the least restrictive or least intrusive means.

Ward v. Rock Against Racism, 491 U.S. 781, 797-8 (1989). *See also City News and Novelty v. City of Waukesha*, 170 Wis.2d 14, 25-6, 487 N.W.2d at 320 (Wis. App. 1992). Thus, petitioner ignores well-established law with this claim.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLES OF *FW/PBS* IN DETERMINING THAT WAUKESHA'S LICENSING SCHEME CONTAINS THE APPROPRIATE PROCEDURAL SAFEGUARDS

The petitioner makes a facial challenge to Waukesha Municipal Code § 8.195. (Petition pp. 13-17). It is the most

difficult challenge to mount successfully since the challenger must establishment that *no* set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 746 (1987). The U.S. Supreme Court reiterated this standard in *FW/PBS* by stating that, "every application of the statute must create an impermissible risk of suppression of ideas." 493 U.S. at 224.

The Court of Appeals applied the constitutional framework set forth in *FW/PBS* rejecting petitioner's claims that the ordinance contained inadequate time limits and failed to preserve the status quo. (A. 19-22). The court also affirmatively asserted that the ordinance provides prompt judicial determination as stated by the plurality in *FW/PBS*, 493 U.S. at 227, 228. With regard to the latter, the Court of Appeals cited several other decisions such as *Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993), *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) in support of its interpretation. In addition, the court indicated that the municipality did not have the authority to direct the state court to issue a decision within a specific brief period of time. (A. 22). This is in accord with well-settled principles of the separation of powers doctrine. *Complaint Against Grady*, 118 Wis.2d 762, 348 N.W.2d 559 (1984).

Petitioner asserts that the City could overcome the separation of powers problem by specifying in the ordinance that the status quo be preserved throughout the judicial review process. This argument, which erroneously combines two separate and distinct requirements established by *FW/PBS*, must fail. Preserving the status

quo throughout the judicial review process would do absolutely nothing to hasten review; therefore, it cannot be viewed as having any import whatsoever on a facial challenge of the ordinance and should be disregarded. The Court of Appeals correctly interpreted existing law when it concluded that the City could not dictate the State court's schedule.

In rejecting the petitioner's argument that Waukesha's licensing scheme was the same scenario that was struck down in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), the Wisconsin Court of Appeals applied the constitutional framework established in *FW/PBS* by concluding,

> Unlike *Redner*, however, ch. 68 does not contain contingencies that leave an applicant at the mercy of the licensor's discretion. Perhaps more importantly, once the administrative review appeals board has issued its final determination *see § 68.12(1), Stats.* appellant may obtain *immediate* judicial review. "The chapter 68 Stats' framework for judicial review provides a fixed timetable from the time the municipal authorities initial determination to the date of the administrative review appeals board decision." (A. 18.)

CONCLUSION

Petitioners fail to advance any significant or substantial reason for review. The Court of Appeals properly applied well-settled principles of constitutional law. Review by the Supreme Court will not fulfill any of the

requirements or goals of Rule 10(c). The petition for review should be denied.

Dated this 15th day of May, 2000.

Respectfully submitted,

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